

11-1800-8324-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Denial of
the Family Foster Care License of
LAW
Barb Benson
AND RECOMMENDATION

FINDINGS OF FACT
CONCLUSIONS OF

This matter came on for hearing before Administrative Law Judge Barbara L. Neilson on February 15, 1994, at 1:00 p.m. at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota. Steven A. Sicheneder, Tennis and Sicheneder, P.A., 20 North Lake Street, Suite 202, Forest Lake, Minnesota 55025, appeared on behalf of the Applicant, Barb Benson. Alfred S. Alliegro, Assistant Chisago County Attorney, 313 North Main Street, Room 373, Center City, Minnesota 55012-9663 appeared on behalf of the Minnesota Department of Human Services (Department). Both parties submitted post-hearing briefs. The record closed in this matter on March 10, 1994, when the parties indicated no replies would be submitted.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any shall be filed with Commissioner Maria Gomez, Office of the Commissioner, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Barb Benson resides at 37781 Townline Road, North Branch, Minnesota. On September 29, 1992, the other persons living at that residence were her daughters, Jennifer (DOB July 20, 1976) and Nichole (DOB April 15, 1985), and Mandy Karja (DOB April 15, 1977). Benson submitted an application to the Department for a family foster care license. The license application was submitted to become eligible as a foster parent for Mandy. Mandy had been placed with Benson for foster care in August, 1992, by

Hennepin County. Hennepin County was aware at the time of placement that Benson was not licensed as a foster care provider. Benson knew the Karja family, including Mandy and her mother, before the placement.

2. During the summer of 1992, Karla Johnson and her son, Raoul, were living at the Benson residence. The expectation was for Raoul to attend school in North Branch to assist Raoul in resolving personal problems he had experienced. Neither Karla Johnson or Raoul were living in the Benson residence on September 29, 1992, when the application for a foster care license was submitted. The application did not mention Johnson or Raoul. Benson continued to receive mail for the Johnsons after they were no longer living in her home.

3. As part of the application process, background studies were conducted on Benson and her daughter, Jennifer. These studies, conducted in late 1992, showed no disqualifying factors or other concerns.

4. On October 28, 1992, Benson's home was inspected by the State Fire Marshal's Office to assess the residence for suitability as a foster care home. The inspector reported that modifications were required to a wood stove, a UL listing for that wood stove was needed, the oil furnace needed cleaning and inspection, a smoke detector was required on the first floor, and a double cylinder lock must be removed.

5. In December, 1992, Chisago County requested that Benson obtain an authorization for a background check to be made on Alan Clark. The request was based on information the Clark may have been "staying over" at the Benson residence on weekends. Benson and Clark were dating at the time. The authorization was signed and submitted on January 19, 1993. The Chisago County Sheriff's Department received the request for a background check from Chisago County on February 19, 1993. The background check disclosed no disqualifying factors on Clark. A second background check was done on Benson at this time. The relevant information in the Bureau of Criminal Apprehension reports states "2-26-88 DUI on Barbara Benson."

6. A second inspection of the Benson residence was conducted by the Fire Marshal on January 20, 1993. That inspection found that the previous corrections required had been complied with, except for the removal of the double cylinder lock and the installation of the smoke detector. An attempt to install the smoke detector was made by the inspector during the inspection. The inspector could not get the smoke detector installed.

7. On February 2, 1993, Benson, her daughter Nicole, and Mandy Karja travelled to Mazatlan, Mexico to assist Clark in opening a restaurant. Benson obtained the consent of Mandy Kerja, Mandy's mother, the Hennepin County placement worker, Chisago County, and the North Branch schools for the trip. Nichole and Mandy Karja received "home schooling" during their stay in Mexico. Benson's daughter Jennifer remained in Minnesota to avoid interrupting her high school coursework. Jennifer stayed with Benson's father in

Minneapolis and commuted to school in North Branch.

8. On April 16, 1993, Benson, Nichole, and Mandy Karja returned to North Branch. They found the house had been vandalized. Furniture was broken, photographs torn, clothing ripped and strewn about, and graffiti spray painted on the walls. Used condoms were found in many of the rooms. The water pipes had frozen, including the well pipe. The water pump was broken. Between the damage to the home and the lack of water, the home could not be lived in.

9. Since Benson's residence was unusable, the family moved in with Benson's father in Minneapolis. Mandy Karja and Nichole remained in the same schools they attended before the trip to Mexico. Benson obtained a position as a paralegal working for several temporary services. The work required Benson to leave at 6:00 a.m. and she would return usually by 6:00 p.m. Nichole's school let out before 4:00 p.m. Since Benson was unavailable to pick up Nichole after school due to her employment, Jennifer was primarily responsible for Nichole's transportation from school. When Jennifer was unavailable, Nichole was to ride the school bus from her school to the home of Tressa Gustafson, one of Nichole's classmates. Sandy Gustafson, Tressa's mother, had told Benson that Nichole was welcome in her home any time. At first, Benson called Gustafson to inform her that Nichole would be staying, particularly if the stay would be overnight. As this practice continued, Benson did not call prior to Nichole coming over. Gustafson did not object to Benson failing to give prior notice.

10. The Gustafson residence is located near the Benson residence. Since the residence required so much work to return to a habitable condition, Benson and her father were frequently out to the residence after her working hours. On those days that Nichole went from school to the Gustafson residence and Benson was working on the residence, Benson went to see Nichole. Otherwise, Benson would telephone Nichole at the Gustafson residence. There was some contact, in person or by telephone, every day during the period the Benson family was out of its house.

11. Due to the variations in Jennifer's schedule, Nichole could not be sure whether she would be riding with Jennifer to Minneapolis or taking the bus with Tressa to the Gustafson home. On two occasions, staff at Nichole's school needed to assist Nichole in determining how she would be leaving school. At no time was Nichole unsupervised by either school personnel, Jennifer, or Gustafson. At no time was Nichole put under the care of child protection or law enforcement personnel since there was always a responsible person present.

12. On May 19, 1993, Chisago County Child Protection (Child Protection) received a telephone call reporting that Nichole was "frequently tired and upset at school." County Exhibit 1. The call complained that the child care arrangements had not been confirmed in advance. Id.

13. On June 3, 1993, Child Protection contacted Gustafson to

inquire about the child care arrangements for Nichole. Gustafson confirmed that she was taking care of Nichole on those days when Nichole was not able to ride with Jennifer. Gustafson was not aware of any instance when Nichole was left unsupervised.

14. A reporting form was received by Child Protection from a person suspecting neglect. The form arrived on June 3, 1993. The instances reported were:

- A) Nichole comes with tank tops and bare legs in winter and no boots or mittens.
- B) Nichole does not have a snack at school and often lacks a lunch or lunch money.
- C) Nichole was upset because she is not sure where to go after school.
- D) The reporter stated that whoever is supposed to pick up Nichole frequently does not show up.

15. A report was made to Child Protection on June 3, 1992, that was comprised of notes, apparently from Nichole's school. The notes indicate that on May 27, 1993, Nichole came to the school's office to find out where she was supposed to go that evening. The school called Benson at work and Benson informed them that Jennifer would be picking up Nichole. After the school could not locate Jennifer, the school contacted Benson again who called another adult to pick up Nichole. Both Jennifer and the adult arrived at the school to pick up Nichole.

16. Child Protection called the school on June 4, 1993, to determine if Benson had made definite plans for Nichole's child care that day. The school denied that any specific instructions were given by Benson regarding Nichole.

17. Child Protection completed its report on June 14, 1993. The report concluded:

This complaint is considered substantiated because ZZ [name redacted in exhibit] offered documentation that ZZ had been arranging child care for Nichole Benson after school on an ongoing basis. In addition, the person that Barb Benson named as responsible for child care for Nichole after school indicate to this worker that Barb had not always made child care arrangements with her regarding Nichole's care for after school and overnight visits.

County Exhibit 1, p. 12.

18. Benson was able to restore her home to a usable condition in about six weeks. Benson's efforts to restore the home were hampered by the lack of water at the home. Ultimately, a new well was drilled at the home to provide water. Benson had repaired the damage to her home by the first week in June to the extent that the house could be inhabited. For a few days, the family stayed at a North Branch motel. Benson, Jennifer,

Nichole, and Mandy Karja moved back in to the house as soon as it was repaired.

19. On June 9, 1993, Child Protection determined that maltreatment of Nichole had occurred and sent a letter to Benson advising her that child protective services would be initiated.

20. On June 16, 1993, Chisago County wrote to Benson and informed her that the maltreatment finding by Child Protection constituted a disqualifier under the licensing rules and advised Benson that any appeal should be sent to the Chisago County Human Services within thirty days.

21. On June 30, 1993, Chisago County completed a foster care home study. County Exhibit 2. That study recommended that Benson not be licensed for the following reasons:

the failure to notify the agency of other persons residing in her home in order to complete required background checks; unapproved boarders residing in her home; and the failure to cooperate with the licensing agency.

County Exhibit 2, at 6.

22. On July 12, 1993, Benson mailed an appeal of the disqualification to Chisago County, at the address listed on the June 16, 1993 notice. That appeal request was not responded to by Chisago County or the Department.

23. On July 20, 1993, the Department denied Benson's application for a family foster care license. The Department cited Benson's disqualification and the failure to notify Chisago County of other persons living in her home. County Exhibit 6. The denial letter contained a description of the appeal process, which requires receipt of an appeal by the Commissioner of Human Services within twenty days after receipt of the denial.

24. On August 30, 1993, Benson filed an appeal of the Department's denial of a foster care license.

25. In September, 1993, Mandy Karja left the Benson residence to live and work in Minneapolis. The circumstances under which Mandy Karja left were mutually agreeable and did not relate to the quality of foster care provided by Benson.

26. On September 23, 1993, the Fire Marshal conducted a follow-up inspection of the Benson residence. The inspection found that prior orders had been complied with, and made three additional recommendations to comply with the occupancy requirements. Those three items were the addition of a fire extinguisher, the addition of a smoke detector in the basement stairwell, and the fastening of a light socket in accordance with the electrical code. None of the three items were previously cited by the inspector as deficiencies.

27. The Department issued a Notice of Hearing on September 7, 1993, which was transmitted to Chisago County. Chisago County

served the Notice of Hearing on Benson by mail on October 5, 1993. Chisago County added an Appendix A which stated the grounds for denial of the application. The grounds for denial were: A) Benson's failure to notify Chisago County of persons living in the residence so background checks could be performed, and B) the determination of maltreatment made by Child Protection regarding Nichole.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. 14.57, 245A.05, and 245A.08.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Pursuant to Minn. Stat. 245A.08, subd. 3(b) (1992), an applicant for licensure bears the burden of proof at a hearing on the denial of the application to demonstrate by a preponderance of the evidence that he or she has complied fully with Minn. Stat. 245A.01 through 245A.15 and other applicable laws and rules and that the application should be approved and a license granted.

4. Minn. Stat. 245A.04, subd. 3 (1992), requires the Commissioner of Human Services to conduct background studies prior to the issuance of a license. Such studies must include information from the Bureau of Criminal Apprehension and may include arrest and investigative information from various sources. Pursuant to the statute and Minn. Rules pt. 9543.3030, the individuals to be studied include the applicant, persons over the age of 13 living in the household where foster care services will be provided, current employees or contractors of the applicant who will have direct contact with foster children and unsupervised volunteers who have direct contact with foster children. "Direct contact" is defined in the statute to include "providing face-to-face care, training, supervision, counseling, consultation, or medication assistance to persons served by a program."

5. Minn. Rules pt. 9545.0080 (1991) provides that a family foster home (FFH) "may not have adult roomers or boarders unrelated to the FFH provider without special permission of the agency. The FFH shall keep the agency informed about all persons living in the home and all others having regular contact with the foster child in the foster home."

6. Minn. Rules pt. 9545.0070 (1991) provides that the agency "must be notified, in advance, of any changes that would affect the terms of the license, such as a change of address or additional persons in the home."

7. At the time of her foster care application, the Applicant

satisfied the requirements of Minn. Rules pt. 9543.3030 and did not fail to inform the Local Agency of boarders or additional persons in the home in violation of Minn. Rules pts. 9545.0070 or 9545.0080. The two persons cited by Chisago County as living at the residence, Karla and Raoul Johnson, were no longer staying at the Benson residence by the time the application was submitted. In addition, the Applicant complied with Chisago County's request that her boyfriend, Alan Clark, submit a criminal history release even though Mr. Clark did not live in the household or fall within any of the other categories of persons clearly required to submit to a background study pursuant to Minn. Stat. 245A.04, subd. 3, or Minn. Rules pt. 9543.3030.

8. Minn. Rules pt. 9543.0090 (A)(1) (1991) provides that a family foster home license "shall be not issued or renewed where any person . . . living in the household has . . . a disqualification under part 9543.3070"

9. Minn. Rules pt. 9543.3070, subp. 1 (1991), provides in pertinent part as follows:

Disqualifications. Items A to D disqualify an individual from programs serving children or adults.

C. The subject is identified as the perpetrator in a determination that maltreatment of minors has occurred and a preponderance of evidence indicates:

(1) an act that meets the definition of maltreatment in Minnesota Statutes, section 626.556, subdivision 10e, paragraph (a), occurred;

(2) the subject committed the maltreatment; and

(3) the maltreatment was serious or recurring.

10. Minn. Stat. 626.556, subd. 10e(a) (1992), provides that, "[f]or the purposes of this subdivision, 'maltreatment' means any of the following acts or omissions committed by a person responsible for the child's care: . . . (2) neglect as defined in subdivision 2, paragraph (c). . . ."

11. Minn. Stat. 626.556, subd. 2(c) (1992), defines "neglect" for the purposes of determining whether a child is maltreated as follows:

"Neglect" means failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter, or medical care when reasonably able to do so, failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able to do so, or failure to take steps to ensure that a child is educated in accordance with state law. . . .

12. The Applicant did not fail to supply her daughter, Nichole, with necessary food, clothing, shelter, or medical care. She did

not fail to protect Nichole from conditions or actions which imminently and seriously endangered Nichole's physical or mental health. She also took steps to ensure that Nichole and Mandy Karja were educated in accordance with state law.

13. Minn. Stat. 245A.04, subd. 3b (1992), and Minn. Rules pt. 9543.3080 (1991), provide that the individual may request reconsideration of the notice of disqualification by submitting a written request for reconsideration within 30 days after receiving notice of disqualification. The statute and rule specify that the Commissioner of Human Services shall set aside the disqualification if the Commissioner determines that the information relied upon in the disqualification is incorrect or the subject does not pose a risk of harm to any person served by the program. In making this determination, the rule requires the Commissioner to consider at least:

- (1) the nature and severity of the disqualifying event;
- (2) the consequences of the disqualifying event;
- (3) the number of disqualifying factors or events;
- (4) the relation between the disqualification and the health, safety, and rights of persons served by the program, including factors such as:
 - (a) the age and vulnerability of victims at the time of the incident;
 - (b) the harm suffered by a victim; and
 - (c) the similarity between a victim and persons served by the program;
- (5) the time elapsed without a repeat of the same or similar event;
- (6) documentation of successful completion of training or rehabilitation pertinent to the incident; and
- (7) any other information relevant to the reconsideration decision.

14. The information relied upon for the disqualification, that Benson committed an act of neglect toward Nicole, is incorrect. Benson poses no risk of harm to foster care children. The standards for setting aside the disqualification are met in this case.

Based on the foregoing Conclusions and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge respectfully makes the following:

RECOMMENDATION

That Barb Benson be GRANTED a family foster care license

Dated: April , 1994

BARBARA L. NEILSON

Judge

MEMORANDUM

At the hearing, the social worker for Chisago County described her understanding of who is subject to the background check requirement as "anyone who has face-to-face contact with the child." This is not the law. The background check requirement is limited to the provider of services, persons over 13 years of age living at the residence where services are provided, employees with direct contact with persons served, and unsupervised volunteers with direct contact with persons served. Minn. Rule 9545.3030. Persons who lived with the provider prior to making an application for licensure are not subject to the background requirement. Neither Karla Johnson nor her son were residing in the residence at the time of the application. The objection to granting a license for Benson's failure to have a background check done on Karla Johnson and her son Raoul has no basis in law.

The rules are unclear on what constitutes "living in the household." When Benson made her application for licensure, she was not dating Alan Clark. When Benson was dating Clark, he was living at his own home, not the Benson residence. The record is unclear as to what contact Clark had with the foster child. Under the rules it is not clear that Clark is required to submit a background check. Once Chisago County asked for authorization to conduct a background check on Clark, Benson provided that authorization. Chisago County took a full month to transmit the authorization to the Chisago County Sheriff's Office. There is no evidence in the record that Benson failed to cooperate with Chisago County on background checks required by Minn. Rule 9543.3030.

Chisago County Child Protection's finding that Benson committed neglect is not supported by substantial evidence. The reason given in Child Protection's June 14, 1993, report is that a school staff person, "ZZ," arranged child care for Benson's daughter Nichole. Nothing in the report shows that "ZZ" arranged child care for Nichole. The report does show that on several occasions Nichole was not aware of where she was going to go after school. The child care for Nichole was arranged by Benson, Gustafson, and Jennifer. The actions taken by "ZZ" confirmed the existing arrangements and on one occasion caused two persons to arrive to care for Nichole. On no occasion was Nichole without responsible supervision. In fact, the only child in the report without supervision was Nichole's classmate, Tressa. From the report, Child Protection did not think that actually having a second-grader without supervision for a short period of time warranted a finding of neglect.

Chisago County relies upon the fact that the Commissioner has not set aside the disqualification found by Child Protection.

The disqualification was appealed by Benson in a timely fashion and the appeal was sent to Chisago County. There is no indication in the record why the appeal was not ultimately received by the Commissioner of Human Services. Even without a disqualification appeal, however, the underlying facts of a disqualification can be examined in a license denial hearing. In the Matter of the Day Care License Application of Carol Bruhjell, OAH Docket No. 69-1800-6688-2 (Commissioner's Order dated December 18, 1992).

A number of other matters have been referred to in the Findings of Fact. While these matters do not appear to have been relied upon by Chisago County or the Department in denying Benson's application, they should be dealt with to ensure that this matter is resolved. Benson received a ticket for DUI in 1988. There is no record of a conviction for driving while intoxicated. The appeal documents filed by Benson indicate that her blood-alcohol concentration in that incident was .10 which is the lowest concentration over the legal limit for that offense. See Minn. Stat. 169.121, subd. 1. A four year-old citation for DUI does not support a conclusion that Benson lied about having alcohol problems. Benson acknowledged social drinking, but that fact does not constitute a disqualification.

The Child Protection report (County Exhibit 1) notes a report received on June 3, 1993 that Nichole had been improperly dressed for winter weather while at school. The Child Protection report stated in that regard:

It should be noted that Barb [Benson] adamantly stated that Nichole did not wear improper clothing to school, yet she does not see Nichole when she goes to school, nor does she see what Nichole wears when she leaves from Tressa's home.

County Exhibit 1, at 10.

The only time that Nichole had been in Minnesota in 1993 during the winter was in January. In January, the family was living in the residence and Benson had the opportunity to control what Nichole was wearing to school. The family was in Mexico from the beginning of February to mid-April. Only when the family returned to North Branch in mid-April and found the residence vandalized did Benson not have an opportunity to control what Nichole was wearing to school. By mid-April, wearing less clothing to school is often reasonable. The delay in reporting and circumstances surrounding the report render the credibility of the report suspect.

An allegation is contained in the Child Protection report that Nichole was at school without a lunch or lunch money on a number of occasions. County Exhibit 1, at 10. No dates are given as to when this occurred. If this situation occurred after the family returned from Mexico, either Jennifer or Sandy Gustafson was most likely the responsible person. Since there is no evidence that Benson was told of any problems with lunches, it is inappropriate to deny Benson a license on that ground.

The situation surrounding the three inspections by the State Fire Marshal's Office is cited as Benson failing to cooperate with, or actively lying to, Chisago County. The Judge finds Benson's explanation, that she informed Chisago County as particular items on the inspection report were completed, to be credible. It is not unreasonable that Chisago County would erroneously conclude that Benson was saying the report was completely complied with. By the time of the September 9, 1993 inspection, Benson had complied with both prior correction orders.

Three items to be corrected were added in the September 9, 1993 inspection. None of these items were previously cited. Benson complied with all the prior correction orders within a reasonable time, particularly considering the vandalism of the residence and the additional burden that placed upon Benson. The addition of new items in a correction order does not preclude Benson from receiving a family foster care license and thereby receiving compensation for the time she provided foster care. The Commissioner may choose to condition any future placement on complete compliance the last correction order.